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No. 546

Supreme Court of the United States.

OCTOBER TERM, 1923.

WILLIAM R. RODMAN, United States Marshal,
Petitioner,

vs.

ROLAND R. POTHIER,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

DAVIS G. ARNOLD,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

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against

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

I.

The respondent was indicted under Section 272 of the Federal Penal Code, for shooting Major Cronkhite on October 25, 1918, "within and on lands theretofore acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, within and on the Camp Lewis Military Reservation," and he was sought to be removed for trial under the indictment, fom Rhode Island to the State of Washington pursuant to Section 1014 of the United States Revised Statutes. In that proceeding it became the duty of the Court before which he was brought, to determine whether there was probable cause that an offense against the United States had been committed, and whether the Court to which the accused was sought to be removed had jurisdiction of the same.

The Circuit Court of Appeals has determined these questions in the negative. This case originally came be-

fore this Court on an appeal by Pothier from a decision of the United States District Court for Rhode Island directing his removal. By a decision rendered on March 12, 1923, *Pothier* v. *Rodman*, 261 U. S.—(43 Supr. Ct. Rep. 374), the record was transferred by this Court to the Circuit Court of Appeals for the First Circuit, on the ground that the question raised was not one directly appealable to this Court from the District Court, the objection raised being of a character which went to the merits, and not to the jurisdiction of the District Court of Rhode Island.

The Circuit Court of Appeals, in a careful opinion, which is appended hereto, proceeded to consider the question as to whether this was a proper case for removal under the statute, and the extent to which it could, in such proceeding, determine whether probable cause had been established showing that an offense against the United States had been committed.

That the Court possessed such power was determined in *Tinsley* v. *Treat*, 205 U. S. 20, *Price* v. *Henkel*, 216 U. S. 491, *Henry* v. *Henkel*, 235 U. S. 228, *United States* v. *Black*, 160 Fed. Rep. 431, and *Hastings* v. *Murchie*, 219 Fed. Rep. 83, 88, as well as in other cases cited in the opinion below.

Section 272 of the Federal Penal Code, which is the statute under which the indictment was found, refers to crimes and offenses punishable under the laws of the United States. The material provision reads

> "Third. When committed within or on any lands reserved or *acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State* in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

It is therefore an essential element of the offense, as is indicated also by the terms of the indictment, that the crime must have been committed on lands acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or purchased or otherwise acquired by the United States by consent of the Legislature of the State in which the same shall be. Consequently if, in the removal proceedings, the proof negatived the existence of the essential element just mentioned, there was no probable cause for finding that a crime had been committed, and it was the duty of the Court to deny the application for removal.

The petition for the writ of certiorari totally ignores the character of these proceedings, and apparently proceeds on the theory that, because this question might be tried in the District Court for the Western District of Washington, the Federal Courts within the jurisdiction where the respondent was arrested cannot exercise the power conferred upon them by Section 1014 of the United States Revised Statutes.

The finding of an indictment is by no means conclusive (*Price* v. *Henkel*, 216 U. S. 491; *Tinsley* v. *Treat*, 205 U. S. 20). The duty of adjudication on the question of probable cause and of jurisdiction nevertheless rested upon the courts before which the respondent was brought. As was said by Mr. Justice Brewer in *Beavers* v. *Henkel*, 194 U. S. 73, 83, in language approved in *Tinsley* v. *Treat* and other cases, *supra*:

> "It may be conceded that no such removal should be summarily and arbitrarily made. There are risks and burdens attending it which ought not to be needlessly cast upon any individual. These may not be serious in a removal from New York to Brooklyn, but might be if the removal was from San Francisco to New York. And statutory provisions must be interpreted in the light of all that

> may be done under them. We must never forget that in all controversies, civil or criminal, between the Government and an individual the latter is entitled to reasonable protection. Such seems to have been the purpose of Congress in enacting Section 1014, Rev. Stat, which requires that the order of removal be issued by the judge of the district in which the defendant is arrested. In other words, the removal is made a judicial, rather than a mere ministerial act."

See also,

Greene v. *Henkel*, 183 U. S. 261.

The case of *Louie* v. *United States*, 254 U. S. 548, cited by the Government, was not one of removal from one district to another, as this is. There, Louie was indicted for killing an Indian within the limits of a reservation in Idaho, the indictment being found in the United States District Court in that State and the prisoner being tried in that court. During the course of the trial the question was raised as to whether, under the terms of the Federal statute, the District Court had jurisdiction of the crime charged and of the defendant's person. After a conviction, a writ of error was sued out to the United States Circuit Court of Appeals for the Ninth Circuit, where it was held that that Court had no jurisdiction to review the judgment of the District Court, and the writ of error was accordingly dismissed (264 Fed. Rep. 395). A writ of certiorari was then granted by this Court for the review of the judgment of the Circuit Court of Appeals, and it was held that the judgment of the District Court was not reviewable by direct writ of error from this Court, as had been contended in the Circuit Court of Appeals, but that it should go in the first instance to the latter court. The judgment of that court was therefore reversed and the case was remanded to it for further proceedings. When the case came before the Circuit Court

of Appeals in accordance with the mandate of this Court, the conviction was reversed on the ground that the Federal courts were without jurisdiction of the crime, and that the State courts had exclusive jurisdiction of it, regardless of the fact that the place where the crime was committed was within the boundaries of the Coeur d'Aléne Indian Reservation in Idaho (274 Fed. Rep. 47).

In the present case the question is not so much one of the jurisdiction of the Court, as it is of the jurisdiction of the sovereignty. It is not one relating to appellate procedure, but to the power of the Government of the United States to exercise exclusive jurisdiction in its broadest sense over the lands constituting the Camp Lewis Military Reservation. Consequently it comes within the decisions specifically applicable to removal proceedings and within the term "jurisdiction" as used in the decisions under Section 1014.

II.

The record shows that, at the time when Major Cronkite met his death, title to the Camp Lewis Reservation had not been acquired by the United States, and the jurisdiction of the State of Washington, as a sovereign state over the lands, had not passed out of it and into the Government of the United States. There was, therefore, a total absence of probable cause as to an essential element of the crime pleaded.

On October 25, 1918, the day when the alleged crime was committed, the United States concededly had no title to any part of the Camp Lewis Reservation. It had not even taken legal proceedings for the acquisition of the title. It had no contract under which it could claim the

title. It had paid no consideration for any part of the land. Not only was it without a deed, but a deed had at that time been refused. It was not until on or about October 1, 1919, that the United States acquired title to these lands. That was nearly a year after the commission of the alleged crime; when the authorities of Pierce County executed and acknowledged and caused to be recorded a deed of the premises, and Newton D. Baker, Secretary of War, approved and accepted it.

It is erroneously stated in the petition that on December 2, 1916, the Secretary of War, with the approval of the President, agreed with Pierce County, Washington, in consideration of the donation by that county to the United States of certain lands theretofore designated by the Secretary of War, the United States would establish thereon and maintain a permanent military reservation. That statement is repeated several times, but it misconceives the facts.

On December 2, 1916, the Secretary of War wrote a letter to "Stephen C. Appleby, Chairman Pierce County Committee,"—a self-constituted committee of citizens of Pierce County, to the effect that at a hearing conducted at the Secretary's office "there was discussed informally the proposition tentatively advanced to donate a tract of land to the United States as a site for a permanent mobilization, training and supply station, at or near American Lake in Pierce County, Washington." (*Rec.* p. 183).

This communication contained none of the elements of an agreement. It is not claimed that Mr. Appleby or its Committee of which he was the Chairman had any authority to contract for the county, and in fact he did not. At that time neither the United States nor the State of Washington, nor Pierce County, owned a foot of the land which constituted the proposed reservation. It belonged to many hundred private owners. It was neces-

sary to acquire their title. The United States did not undertake to purchase an inch of land for the purposes of the reservation or to institute condemnation proceedings to acquire the land or to pay any part of the cost of its acquisition; nor did Pierce County nor the State of Washington nor any land-owner agree to convey any land to the United States.

By Chapter 3 of the Laws of 1917 the Legislature of the State of Washington authorized Pierce County to acquire, by condemnation or otherwise, lands in that county aggregating approximately seventy thousand acres, at such location or locations as might have been or might be thereafter from time to time selected or approved by the Secretary of War, and to convey such lands to the United States. The county was authorized to incur a liability to the extent of $2,000,000 to acquire the lands, and was given power of condemnation in order to secure the title to the lands. Careful provision was made in the act as to the manner in which the lands acquired were to be conveyed to the United States and as to how the exclusive jurisdiction over these lands was to pass from the State of Washington to the United States. This was accomplished by Section 20 of the act, which reads as follows:

> "Pursuant to the Constitution and laws of the United States * * * the consent of the legislature of the State of Washington is hereby given to the United States to acquire, by donation *from Pierce County, title to all lands herein intended to be referred to, to be evidenced by the deed or deeds of Pierce County signed by the chairman of its board of county commissioners and attested by the clerk of such board under the seal of such board*, and the consent of the State of Washington is hereby given to the exercise by the Congress of the United States of exclusive legislation in all cases whatsoever over such tracts or parcels of land *so conveyed to it: Provided, upon such conveyance be-*

ing concluded a sufficient description by metes and bounds and an accurate plat or map of each such tract or parcel of land be filed in the auditor's office of Pierce County, together with copies of the orders, deeds, patents or other evidences in writing of the title of the United States: * * *."

As has already been said, it was not until October 1, 1919, that a deed was executed by Pierce County in the manner set forth in this statute, or in any other manner, conveying the lands constituting Camp Lewis Reservation to the United States. It was not until then that any conveyance was approved and accepted on behalf of the United States. It was not until November 15, 1919, that the deed was filed in the auditor's office of Pierce County with the map attached to it, as required by the terms of the statute.

In the absence of this legislation, there can be no possible question but that the courts of the United States would have had no jurisdiction over the crime of murder committed on the tract of land referred to. It is only by virtue of the cession of jurisdiction accomplished by this section that such jurisdiction was created. The terms of the act, however, are specific as to when and how such cession was to become effective. *It would only be when the United States acquired the title to the lands referred to in the act. That title could only be acquired by the execution of a conveyance to the United States from Pierce County, after the later had acquired the title to the lands in question.*

The nature of the conveyance was expressly specified. It was to be evidenced by the deed or deeds of Pierce County, signed by the Chairman of its Board of County Commissioners and attested by the Clerk of said Board under the seal of such Board. Until the execution of the conveyance it was not determined what lands were to be conveyed or accepted, what exceptions and what reservations were to be created, what conditions were to be im-

posed, what was to be included or excluded; in short, whether a grant would be made or if made whether it would be acceptable. In the meantime sovereignty over this large tract of land, lying with the State of Washington was not to rest *in nubibus*. It was not to be "No Man's Land," for jurisdictional purposes. Jurisdiction would follow the title. That was certainly not in the United States until conveyed in the manner prescribed by statute. Until such conveyance exclusive jurisdiction continued to reside in the State of Washington.

The execution of this conveyance was clearly a prerequisite to the acquisition of title to these lands by the United States, and to the cession of jurisdiction over these lands by the State of Washington to the United States. That controlling act not having taken place until more than a year after the alleged offence, the State alone had jurisdiction over any offense committed upon those lands, while the title either still remained in the original owners or was vested in Pierce County.

Land is "conveyed" when legal title thereto is deeded. Title cannot be vested under a deed before it is delivered and accepted.

Abendroth v. *Town of Greenwich*, 20 Conn. 356, 365.
Fairfax v. *Lewis*, 11 Leigh, 233, 248.
Langmede v. *Weaver*, 65 Ohio St. 17.
Jones v. *Davis*, 22 Wis. 421, 424.
McDonald v. *Campbell*, 2 Serg. & R. 473, 474.
Van v. *Edwards*, 135 N. C. 661.
Jackson ex dem Hopkins v. *Leake*, 12 Wend. 105.
Mitchell v. *Bartlett*, 51 N. Y. 447.
Kochler v. *Hughes*, 148 N. Y. 507.

An examination of the deed shows that it contains numerous exceptions, reservations and conditions, and

that the entire conveyance was made subject "to the express condition that if the United States should ever cease to maintain the tract above described for the uses above named, title to the lands above described will revert to said Pierce County without further act by it to be performed." (*Rec.* pp. 148-180.)

Not only was there no contract between the United States and the State of Washington or with Pierce County respecting the seventy thousand acres, which were considered for use as a military reservation, but neither the United States nor the State, nor the County, assumed any obligation to each other. The letter of December 2, 1916, was clearly tentative and dependent upon conditions. The necessity of a deed conveying a valid title was, from the beginning, regarded as a *sine qua non* (*Rec.* pp. 184, 185).

The correspondence between the Secretary of War and Mr. Lyle, who had charge of the condemnation proceedings for Pierce County, likewise demonstrates this. This correspondence took place in June and July, 1918. At that time Pierce County had secured title in condemnation proceedings to 36,930 acres only of the 70,000 acres contemplated. In the letter of Mr. Lyle of June 27, 1918, referring to the letter of December 2, 1916, which provided "that Pierce County shall tender a valid deed to the lands intended to be donated," and that the title so conveyed to the United States must be approved by the Attorney-General, he said:

> "The terms of the proposition of December 2, 1916, and the provisions of Chapter 3, Laws of 1917, State of Washington, provide that the conveyance shall be made *by one deed*. As title to the entire area has not as yet been secured, *a deed cannot be tendered at this time*." (*Rec.* p. 64.)

In his answer dated July 1, 1918, the Secretary of War, after referring to an opinion from the Judge Advocate-General, said (*Rec.* p. 76):

"In accordance with the opinion, you are advised that the manner of conducting the proceedings in the above case which you have submitted is satisfactory to the War Department, *and that if the subsequent proceedings are conducted in the same manner and are brought to a conclusion prior to the expiration of the existing war,* AND THE DEED TO THE ENTIRE TRACT IS TENDERED BY PIERCE COUNTY *in accordance with the understanding with the War Department, and as authorized and directed by the act of the Legislature under which the proceedings are brought, I will accept the said deed on behalf of the United States.*"

It is thus apparent that the Government had not accepted a deed of any part of the land constituting the Camp Lewis Reservation, that it had declined to do so, and that as a condition precedent of the acceptance of any deed, the Secretary of War insisted that the deed should cover the entire tract of 70,000 acres, and should be "as authorized and directed by the act of the Legislature." It was only then that the Secretary of War was willing, on behalf of the United States, to accept a conveyance of title to the lands in question.

In order, therefore, that the United States might acquire jurisdiction over this tract, it was necessary that it should acquire the title thereto and the consent of the Legislature of the State of Washington to exercise sovereignty over it. Until the acquisition of title and the consent of the State that sovereignty should be exercised by the Federal Government, the State sovereignty continued to be exclusive.

The authorities are uniform on this proposition. The subject was carefully considered in *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 538, where Mr. Justice Field said:

"The consent of the States to the purchase of lands within them for the special purposes named

> is, however, essential under the Constitution to the transfer to the general government, *with the title*, of political jurisdiction and dominion."

To the same effect is *Chicago, R. I. & P. Ry. Co.* v. *McGlynn*, 114 U. S. 542.

Practically identical in its facts with the present, is the leading case of *People* v. *Godfrey*, 17 Johns. 225, which was fully approved in *Fort Leavenworth R. R. Co.* v. *Lowe, supra.*

Similar cases are:

> *United States* v. *Bateman*, 34 Fed. Rep. 86, cited in *United States* v. *Lewis*, 253 Fed. Rep. 469, 472.
> *United States* v. *Penn*, 48 Fed. Rep. 669.
> *In re O'Connor*, 37 Wis. 379.
> *United States* v. *Tucker*, 122 Fed. Rep. 518.
> *People* v. *Humphrey*, 23 Mich. 471.

As indicative of the soundness of the decision rendered by the Circuit Court of Appeals, in addition to the opinion of that court, there will be found in the Appendix:

(1) A telegram from the Attorney-General of the United States to the United States Attorney at Seattle, recognizing the absence of Federal jurisdiction in this case;

(2) An opinion of the Prosecuting Attorney of Pierce County, Washington, *asserting jurisdiction of the State and the absence of Federal jurisdiction*, but concluding that there was no evidence of the commission of a crime by anybody as the cause of the death of Major Cronkhite; or that in any event Rosenbluth or the respondent were chargeable with it;

(3) A letter from Hiram M. Smith, who investigated the question of jurisdiction and communicated his

views on the subject to the Prosecuting Attorney of the State of Washington;

(4) A carefully reasoned opinion by Mr. Smith on the subject;

(5) The opinion of Commissioner Hitchcock determining in *United States* v. *Rosenbluth* that the State of Washington had exclusive jurisdiction over the alleged crime involved in this case.

Concessions Co. v. *Morris*, 109 Wash. 65, cited for the Government, has no bearing upon the present case. That was an action for an injunction against Pierce County and its officers to restrain the collection of a tax upon real and personal property for the year 1918 upon a barber shop and its equipment located at Camp Lewis. The complaint alleged that the plaintiff erected the building sought to be taxed on the military reservation and "that the reservation is the property of the United States." A demurrer was interposed to this complaint, and its effect was stated by Mr. Justice Mackintosh as follows:

> "The respondents, by demurring, admit the appellant's allegation that the title to the reservation is in the Federal Government, and that therefore the provisions of the act of 1917, hereinafter referred to, relating to the acquisition of such title have been complied with."

The Court, therefore, was precluded from considering aught but the facts conceded to be true by the interposition of the demurrer, and it did not, as it could not, take into account anything *de hors* the record.

The suggestion of the Solicitor General, that under the decision of the Circuit Court of Appeals "defective title may become a new defense for murder," is not a fair criticism. Here there was no question as to a "defect" of title. There was a total absence of title in the United States to the lands constituting Camp Lewis

Reservation. The transfer of title to the United States was a *conditio sine qua non* of a transfer of exclusive jurisdiction from the State to the United States. That condition cannot be nullified by an epigram.

III.

There is no merit in the contention that the United States, with the consent of the legislature of Washington, exercised exclusive de facto jurisdiction over the territory embracing the locus of the crime.

This contention is based on the theory that Camp Lewis had been practically completed before the death of Major Cronkhite and that before its occurrence the training of soldiers had been in progress within its area; in other words, that the United States was in occupancy of the lands. That did not, however, extinguish the sovereignty of the State of Washington over the lands included within the camp. Its exclusive sovereignty could only be terminated by a strict compliance with the terms of the statute, which its Legislature had enacted. If the State had directed the County not to make the conveyance, if the latter after full consideration had concluded that it would not condemn the lands selected, or, because of the expense involved, that it would not carry out the project, the Government of the United States could not have sued the State to compel a conveyance; certainly not to abdicate its sovereignty and to turn it over to the United States Government. Mere occupancy of the land without objection, or with the tacit consent of Pierce County, cannot be regarded as a compliance with the conditions imposed by the statute with respect to the transfer of sovereignty.

In *People* vs. *Godfrey*, and *United States* vs. *Bateman, supra,* it was decided that mere occupancy with tacit State consent of lands within the State for Federal military objects, does not oust the State of its jurisdiction over any crime committed on such lands or confer it upon the United States. Jurisdiction cannot be acquired tortiously or by disseisin of the State, or by mere occupancy.

In *Eminent Domain of States* (1855), 7 Opinions of Attorney General, 573, it was decided that mere ownership and occupancy by the United States of land within a State do not suffice to oust the jurisdiction of the State, even when such occupancy is with the full knowledge and tacit consent of the State.

In *In re O'Connor*, 37 Wis., 384, the fact that the United States had become the actual proprietor of land situated within the limits of the State by purchase was held in no way to affect the paramount authority of the State in the absence of a cession of jurisdiction in the manner directed by the Legislature.

The grant of exclusive jurisdiction united with the cession of territory, in order to be effective as a termination of State jurisdiction, must be the free act of the State.

United States vs. *Bevans*, 3 Wheat, 388.

A state has the right to limit the extent of the tract over which it will cede jurisdiction. Even had the United States purchased additional lands, jurisdiction would remain in the State as to the excess.

Cession of State Jurisdiction (1857), 8 Opinions Attorney General, 388.

In *Opinions of the Judge Advocate General*, we find one designated 015.7, rendered on Feb. 6, 1918, almost contemporaneously with the occurrences in the present case, where it was decided:

> "Lands leased by the Government for cantonment sites are not within the exclusive jurisdiction of the United States within the provisions of clause 17, sec. 8, Article 1 of the Constitution or of the several State statutes ceding jurisdiction to the Federal Government of land purchased for military purposes. Accordingly, the State retains its jurisdiction within the cantonment site, subject to the restriction that it cannot hamper the control or use of such site by the Federal Government. Thus a murder committed within the cantonment site would be triable in the State courts, although if committed by a person subject to military jurisdiction being then triable also by a general court-martial the usual rule applicable to concurrent jurisdiction would apply."

Here there is no question of a court-martial, but merely as to the exercise of criminal jurisdiction by the United States District Court.

Even had there been an agreement to convey the lands intended for a military reservation, that would not have been the equivalent of a conveyance, if conveyance was certainly a condition precedent to the ousting of the State from its sovereign jurisdiction over this territory. The distinction between an agreement to convey and a conveyance is well recognized.

In *Chavez* vs. *Bergere*, 231 U. S., 482, this was clearly pointed out by Mr. Justice Van Devanter.

Nor does this case come within the decisions relating to Government grants. It will be found that, in practically all of them, statutes relating to railroad grants contained language equivalent to that considered in *Schulenberg* vs. *Harriman*, 21 Wall., 44, *Deseret Salt Co.* vs. *Tarpey*, 142 U. S., 241, and other cases, "that there be and is hereby granted" the land specified. These naturally were grants *in praesenti*. Nothing remained to be done. The statute itself constituted a conveyance.

In the present case, however, everything remained to be done when Chapter 3 of the Laws of 1917 was enacted.

The State owned none of the land which was to be used for the Camp Lewis Military Reservation. Neither did the county own any land intended for that purpose. It had to be first acquired by the county by condemnation proceedings, and after it had been so acquired it was contemplated that a conveyance, executed in a particular manner, was to be made and delivered to the United States and accepted by it before title would pass or the State sovereignty would be ceded to the United States. That did not occur until after October 1, 1919.

If the *de facto* exercise of exclusive jurisdiction could extinguish the sovereignty of the State over a part of its territory, then, by the same token, it could be deprived of its jurisdiction over the whole of its territory and could be swallowed up by the National Government.

Moreover, in this case there is no evidence even of the *de facto* exercise of exclusive jurisdiction by the United States over the reservation prior to October 1, 1919. The mere fact of possession by permission of Mr. Lyle, as counsel representing Pierce County in the condemnation proceedings, cannot be contorted into the "*de facto* exercise of exclusive jurisdiction." If so, then permission by the Mayor of Boston for the occupancy of Boston Common by a regiment of United States Marines, for the maintenance of a camp or for conducting military manoeuvers, would operate as a transfer of the exclusive jurisdiction of the Commonwealth of Massachusetts over the land so occupied.

The case of *Holt* v. *United States*, 218 U. S. 245, cited for the Government, in no manner resembles the present case. There the plaintiff in error was indicted for a murder committed "within the Fort Worden Military Reservation, a place under the exclusive jurisdiction of the United States." During the course of the trial several exceptions were taken to the admission and sufficiency of evidence. One of them was an attempt to raise technical difficulties to a fact, which in the language of Mr. Justice

Holmes, "no one really doubts, namely, that the band barracks, the undisputed place of the crime, were within the exclusive jurisdiction of the United States." A witness testified that they were within the enclosure of Fort Worden under military guard and control, from which all unauthorized persons were excluded, and that he knew that the fence was coincident with the boundaries shown on a map objected to but admitted. He identified the band barracks as described in certain condemnation proceedings, and the State of Washington had assented by statute to such proceedings and Congress had authorized them. The deeds and condemnation proceedings under which the United States claimed title were introduced. There was nothing before the Court to question the correctness of the testimony given by way of identification of the locus where the crime was committed as being within the property conveyed. There could, therefore, have been no question in that case but that the crime was committed on lands over which the United States had exclusive jurisdiction.

Here, however, there is no pretence that the United States had any deeds, at the time of Cronkhite's death, of any part of Camp Lewis. On the contrary, it is shown that the title to the reservation was at that time partly in the County of Pierce and to a large extent in private owners, whose title had not been extinguished, and that it was not until by deed dated October 1, 1919, and recorded November 15, 1919, that there was any semblance of title in the United States, or any compliance with the conditions imposed by Chapter 3 of the Laws of 1917 with respect to the passing of sovereignty and jurisdiction to the United States over these lands.

IV.

This is not a case where men indicted for murder are to escape trial altogether because neither the State Court nor the Federal Court will exercise jurisdiction, as contended by the Government.

The Attorney-General of the United States, after concluding that the Federal Court had no jurisdiction, directed the United States Attorney for the State of Washington to submit the facts to the Prosecuting Attorney of Pierce County, and he did so. *The Prosecuting Attorney for Pierce County recognized that the State had jurisdiction*, and then embarked on a most painstaking inquiry into all of the facts brought to his attention, and concluded that there was nothing to justify the prosecution of the persons charged with the crime. His analysis of the alleged proofs submitted to him is a matter of public record.

V.

It is respectfully submitted that this is not a case for the granting of a Writ of Certiorari within established precedents, and that it should be denied.

DAVIS G. ARNOLD,
Counsel for Respondent.

Appendix.

I.

A telegram was sent by the Attorney General of the United States to the United States Attorney at Seattle with reference to the prosecution of Pothier and Rosenbluth for the alleged murder of Major Cronkhite as follows:

Washington, D. C., Mar. 30, 1921.

Replying to yours 28th Cronkhite case. Examination War Department record Pidd case reveals reversed because improper evidence admitted. Question jurisdiction not considered. *Agree with you no federal jurisdiction. You authorized confer with state prosecutor. Give him benefit information now in your possession. Suggest to him issuance of state warrant for both parties and start extradition proceedings.* Entire file covering investigation will be forwarded bureau office at Seattle for delivery to state prosecutor. Bureau will continue investigation and cooperate fully with state authorities. You authorized do likewise. Please keep this phase of case confidential—not permit same to get to press until state authorities think advisable. Rosenbluth now under $20,000 bail New York. Pothier still in custody, Providence. Wire action taken.

DAUGHERTY.

II.

The United States Attorney thereupon turned over to Hon. J. W. Selden, the Prosecuting Attorney of Pierce County, Washington, the information in his possession and thereafter the latter filed in his office an elaborate report in which he concluded that there was no evidence justifying prosecution. In the course of his report he said:

"In September, 1921, this office received a letter from Hiram W. Smith of Richmond, Virginia. In the letter was inclosed a copy of a letter written by him to R. Watkin Ellerson of the same city, wherein he discusses and determines the question of jurisdiction over the Camp Lewis site at the time Major Cronkhite met his death. *His language is so persuasive and forceful that this office adopts his conclusions with reference to the question of jurisdiction and submits both letters as a part of this report.*"

"It may not be out of place to note here that had this office following the suggestion made by the Attorney General in the above telegram, issued warrants and started extradition, one of the greatest mistakes in the course of Pierce County criminal procedure would have been made. The expense to the State of Washington would have been heavy, and had the extradition terminated successfully, the County of Pierce would have had two men on its hands, against one of whom (Captain Rosenbluth) there would have been no legal evidence and the other (Pothier) not a sufficient amount of evidence to have secured a conviction."

III.

Robert H. Pollard
Hiram M. Smith

Bell Telephone
Madison 3572

LAW OFFICES
POLLARD & SMITH
825-827 American Bank Building
Richmond, Virginia.

September 21, 1921.

Hon. J. W. SELDEN,
Tacoma, Washington.

My Dear Sir:

On account of my personal interest in General A. Cronkhite, I have become very much interested in the

matter which now is occupying all of the attention of the general, that is the killing of his son at Camp Lewis, in your State, in October, 1918.

As you know, General Cronkhite commanded the 18th Division which was composed mainly of Virginia and Pennsylvania troops, that the organization of the division was completed by General Cronkhite while he was stationed at Camp Lee, in this State. Therefore, we Virginians have a great deal of affection for him and confidence in him.

The evidence which General Cronkhite has in his possession is to my mind conclusive of the fact that Major Cronkhite was killed and did not die by his own hand.

The attorney general of the United States, I am informed, is of the opinion that the federal courts are without jurisdiction to try Major Cronkhite's assailants and the two persons who have been charged with the murder and arrested have been released.

Until recently I was the United States District Attorney for the eastern district of Virginia and had had considerable experience during the war period in acquiring land for the government and in dealing with the question of the government's jurisdiction thereover.

I think that General Cronkhite was convinced that the courts did have jurisdiction and the question was through mutual friends submitted to me for an opinion. My confidence is that the federal courts are without jurisdiction, and I am enclosing a copy of a letter which I wrote to Mr. H. Watkins Ellerson of this city, in which I have discussed the matter at some length. I send you this with the hope that it may be of some interest to you.

I sincerely trust that you will not think that by thus addressing you, I have in mind any thought of criticism. I send it as a citizen to a public official, and without any

thought of attempting to compel any conclusion or action on your part.

With great respect, I am very truly yours,

(Signed) HIRAM M. SMITH.

IV.

MR. H. WATKINS ELLERSON,
c/o Albermarl Paper Company,
Richmond, Virginia.

My Dear Watt:

You present the following proposition:

A is killed at and within the territorial limits of Camp Lewis, State of Washington. Camp Lewis is a mobilization camp used and occupied by the Federal Government for military purposes. Have the Federal Courts jurisdiction to try and punish the offenders?

The question is answered, of course, by a determination of the extent to which the Federal Government had acquired jurisdiction over the actual land constituting Camp Lewis.

Murder as defined in the Federal Penal Code of 1910 is punishable in the Federal Courts "when committed within or on any lands reserved or acquired for the exclusive use of the United States, and *under the exclusive jurisdiction thereof*" * * *

On the second day of December, 1916, the secretary of war, acting under authority of an Act of Congress, approved on the 29th day of August, 1916 (39 Stats., 623), agreed to accept from the County of Pierce, State of Washington, approximately 70,000 acres of land to be used as a permanent mobilization, training and supply station for the army of the United States. The proposed site was not at that time owned by the County of Pierce, but pursuant to said agreement was subsequently ac-

quired by the County of Pierce under the authority and in accordance with the provisions of an Act of the Legislature of the State of Washington approved January 27, 1917.

On the 25th of October, 1918, when A was killed the County of Pierce had acquired by condemnation something over 33,000 acres of the contemplated land, and this proportion thereof was in actual use as a mobilization camp by the army of the United States. The Act of the Legislature of the State of Washington referred to above provided for the conveyance of the land by deed or deeds from Pierce County, acting through its proper officers, to the United States. This deed was not actually executed or delivered until the first day of October, 1919. It thus appears, having in mind the provision of the Penal Code above quoted, that the land upon which the murder was done had actually been "reserved and acquired for the exclusive use of the United States," but was it "under the exclusive jurisdiction thereof?"

The powers of the Federal Government are given and prescribed by the Constitution and beyond the authority therein contained, it may not go. Specially the authority to exercise exclusive legislation over any "place" is contained in Article I, Section 8, Clause 17 of the Constitution as follows:

> "To exercise exclusive legislation * * * over all places purchased by the consent of the legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards and other needful buildings."

This clause has been construed to include the land acquired for the purpose of any governmental use. However, the Federal Government, acting through one of its executive departments, cannot by its single act obtain "exclusive jurisdiction" over any land which may have been "reserved or acquired for the exclusive use of the United States."

The Constitution itself so provides and makes necessary to the acquisition of exclusive jurisdiction the consent of the sovereign state in which the land may be.

This phrase "within the exclusive jurisdiction of the United States" is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy yards and other places within the boundaries of a state, or even within a territory over which the Federal Government has by cession, by agreement or by reservation, exclusive jurisdiction (Ex parte Gonshay'ee, 130 U. S. L., Ed. 973, 986).

This principle is well expressed in Volume 4, Ency. of U. S. Supreme Court Reports, 153:

> "As to the public lands held by the United States within state limits the right and title of the United States thereto is based upon the deeds of cession made to the Federal Government by the state within whose limits the lands originally were and upon the statutes connected with them, and not upon any municipal sovereignty which the United States may be supposed to possess or to have reserved by compact with new states for that particular purpose. The provisions of the Constitution of the United States, Article 1, Section 8, Clause 17, shows that no such power can be exercised by the United States within a State. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession."

There can be no question that the federal government has or had authority to accept a donation of such land as is in contemplation. See the acts of Congress approved July 2, 1917, and as amended April 11, 1918, to be found in 40 Stats., 241 and 518, respectively.

Having in mind then the fact that the state in which the land is must concur in the right of the federal government to exercise "exclusive legislation," your inquiry must be answered by a determination of the question of whether or not the State of Washington had ceded such

authority. This can be answered in my judgment only in the *negative*.

The act of the legislature of that state above referred to which authorized the County of Pierce to acquire the needed land and prescribed the form of procedure by which it should be acquired also provided:

> Section 20. "Pursuant to the Constitution and laws of the United States, and especially to paragraph 17 of Section 8 of Article 1 of such Constitution the consent of the Legislature of the State of Washington is hereby given to the United States to acquire, by donation from Pierce County, title to all lands herein intended to be referred to, to be evidenced by the deed, or deeds of Pierce County, signed by the chairman of its board of County Commissioners and attested by the Clerk of such Board under the seal of such Board, and the consent of the State of Washington is hereby given to the exercise by the Congress of the United States of exclusive legislation in all cases whatsoever over such tracts or parcels of land so *conveyed* to it."

I am, therefore, of the opinion that the courts of the federal government of the State of Washington had no authority to try or punish the person or persons who were responsible for the death of A.

Yours very truly,

(Signed) HIRAM M. SMITH.

V.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

against

ROBERT ROSENBLUTH,
Defendant.

After hearing counsel, Commissioner Hitchcock made the following decision:

I find:

That the crime alleged to have been committed took place on October 25, 1918, on lands constituting Camp Lewis Military Reservation, which lands were to be conveyed by one deed pursuant to Chapter 3 of the Laws of 1917 of the State of Washington, and which deed was to be accepted by the Secretary of War.

That Camp Lewis Military Reservation was used by the United States as a cantonment and for the training of troops on and prior to the 25th day of October, 1918.

That the deed of conveyance to the United States was executed and accepted on October 1st, 1919, and recorded in the office of the Auditor of the County of Pierce, Washington, on November 15, 1919.

With these findings of fact, I am prepared to announce my disposition of this case. It will undoubtedly appear to be illogical and inconsistent, yet under all the circumstances, it perhaps presents the best method of dealing with it. I agree entirely with every contention made by Mr. Marshall, defendant's counsel, without

qualification or reservation. In my opinion the United States District Court in the State of Washington, where the indictment against the defendant was found, had no jurisdiction whatsoever of the offense charged against him. The alleged killing of Major Cronkhite did not take place on any lands which at the time of the occurrence were under the exclusive jurisdiction of the United States. The State of Washington still possessed exclusive and sovereign jurisdiction over them. So far as any lands had on October 25, 1918, the date of the alleged offense, been acquired for Camp Lewis, the title was vested in Pierce County and not in the United States. Title and jurisdiction could only pass to the Federal Government in compliance with the conditions prescribed by Chapter 3 of the Laws of 1917 of the State of Washington, and in the manner provided by that statute. Until then the sovereign jurisdiction of the State of Washington continued undisturbed. It was not until the Chairman of the Board of Commissioners of Pierce County executed the deed to the entire tract in accordance with the terms of the statute and in compliance with the other requirements prescribed, that the United States acquired title to the lands or jurisdiction over them. It was not until then that the State of Washington parted with such jurisdiction and abdicated its sovereignty over them. That did not occur, at the earliest, until October 1, 1919, about a year after the death of Major Cronkhite. Therefore, in my judgment, if a crime was committed at Camp Lewis on October 25, 1918, the State of Washington had exclusive jurisdiction to deal with it. The United States was at that time entirely devoid of such jurisdiction.

I repeat that I have not the slightest doubt that the Federal courts have no jurisdiction over the offense, assuming that one was committed, and the only testimony adduced before me as to the tragedy itself tended to show the innocence rather than the guilt of the defendant.

Nevertheless, I feel that sitting as a commissioner, who is merely an appointive officer, I should not undertake to pass on this most important question of jurisdiction. It should be determined by a court. Were I a judge, I would not have the slightest hesitation to deny the application for the defendant's removal on the grounds which I have mentioned. But since I am not, the jurisdictional question should be determined by a court. For that reason only, I now direct the matter placed before a District Court Judge, and to facilitate a prompt judicial determination of the fundamental question of jurisdiction, I am prepared to return to the United States District Court for the Southern District of New York the entire record, including the indictment, the testimony and the exhibits adduced before me.

Mr. Selig:

Mr. Commissioner, I wish to bring up again the Concessions Case. This is a very plain case.

Commissioner Hitchcock:

I have also considered that, and I believe that the contention of Mr. Marshall is well founded that the case is not applicable. It was in that case submitted on demurrer thus admitting the allegation that the title was in the United States, so the Court necessarily made its decision on the record before it. Here the defendant has definitely raised the question of title and consequent jurisdiction and both his citations of law and the exhibits introduced in evidence, establish that the jurisdiction was in the State of Washington.

Mr. Selig:

But in that case the Court gave its opinion dehors the demurrer.

Commissioner Hitchcock:

I cannot see that. The United States cannot invade the sovereignty of a State except by its consent. Under the statute relating to the cession of jurisdiction to the United States by the State of Washington that we have before us, there is no doubt in my mind that at the time of the alleged crime, jurisdiction was clearly in the State of Washington and whether or not a crime was committed is a matter that should be tried in the Courts of that State.

Mr. Selig:

As long as the Commissioner has decided as he has, would it not be the best way for the Commissioner to make a return, attach the records and exhibits here, and if you will annex to that return the entire records, the exhibits, the statements of the Commissioner and any other proper documents and certify them to the District Judge, I believe we could have a speedy determination.

Mr. Marshall:

I agree to that procedure.

May I call to the attention of your Honor that really this matter has not been decided by any Judge. There was merely a presentation of the case to the grand jury by the District Attorney and an indictment followed.

Commissioner Hitchcock:

But of course the Judge recorded and filed the indictment.

Mr. Marshall:

That he did as a matter of course. No question of jurisdiction was raised before him; nor could it have

been, the defendant not being before the Court. The first opportunity to raise the jurisdictional question has been in the present proceeding.

Commissioner Hitchcock:

Nevertheless, I feel that this case ought to be decided by a District Judge. In the strongest terms I wish to repeat in my opinion that the Federal Court in the State of Washington had no jurisdiction and I will so certify in my statement to the District Judge.

The foregoing is a correct transcript of the proceeding had before me on January 4, 1923.

SAMUEL M. HITCHCOCK,
U. S. Commissioner,
Southern District of New York.

VI.

Later, after conferring with the Court, the following decision was rendered by the Commissioner and no further proceedings have been taken for the removal of Rosenbluth:

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA
against
ROBERT ROSENBLUTH,
Defendant.

Since the hearing before me on the 4th day of January, 1923, efforts have been made to bring this matter before the Court, or one of the Judges of the Court for review, in accordance with the suggestion made before me at that time, but there seemed to be difficulties in the way of doing so.

In the case of a holding and a commitment in removal proceedings, relief may be obtained by writs of habeas corpus and certiorari.

In the event of a dismissal of such complaint before a Commissioner, there seems to be no right of appeal, however, there seems to be no reason why a proceeding de novo could not be instituted inasmuch as the hearing before the Commissioner can in no sense result in a final determination of the issues involved.

It therefore devolves upon me at this time to decide this matter according to my best judgment, which I have already expressed upon the record at the last hearing, and in accordance therewith I find that the Federal Court in the State of Washington has no jurisdiction in the premises and I therefore deny the Government's petition to remove the defendant to the Western District of Washington for trial upon the indictment there found

and hereby dismiss the complaint herein, and order that the bail heretofore given by the defendant in this proceeding be discharged.

Dated, N. Y., Feb. 13th, 1923.

SAMUEL M. HITCHCOCK.

VII.

The following is a copy of the opinion rendered by the United States Circuit Court of Appeals for the First Circuit in the proceedings for the removal of Pothier from Rhode Island to the State of Washington.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1922.

No. 1629.

ROLAND R. POTHIER,
PETITIONER, APPELLANT,
v.
WILLIAM R. RODMAN, UNITED STATES MARSHAL,
RESPONDENT, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

BEFORE BINGHAM, JOHNSON AND ANDERSON, JJ.

OPINION OF THE COURT.

JUNE 21, 1923.

BINGHAM, J. The appellant, Roland R. Pothier, was indicted in the District Court for the Southern Division of the Western District of the State of Washington on the thirteenth day of October, 1922, for the deliberate murder, with malice aforethought, of Alexander P. Cronkhite on the twenty-fifth day of October, 1918, "within and on land theretofore acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof and within the Southern Division of the Western District of Washington, to wit, within and on the Camp Lewis Military Reservation," contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States. On October

19, 1922, an affidavit (Exhibit D) was filed by John J. Daly before the United States Commissioner for the District of Rhode Island wherein it was charged that Pothier had been indicted in the District Court for the Southern Division of the Western District of Washington for the wilful murder of Alexander P. Cronkhite on "the 25th of October, 1918, at, to wit, Camp Lewis Military Reservation, within the Southern Division of the Western District of Washington," . . . in violation of Section 275 of the Penal Code of the Revised Statutes of the United States"; that a bench warrant on said indictment had been issued from said District Court against him, upon which a return had been made by the United States Marshal of said District that he was unable to find the defendant; and that said Pothier had theretofore "fled from said Southern Division of the Western District of Washington and entered and is now in the State of Rhode Island, in the District of Rhode Island." Although the affidavit (Exhibit D) did not ask that a warrant issue for his apprehension, such a warrant was issued by the Commissioner on the nineteenth day of October, 1922, reciting that John J. Daly "had made a complaint in writing under oath before me" and setting forth the matter therein referred to as stated in the affidavit, on which the appellant was arrested and brought before him "to answer the said complaint." What hearing, if any, was had and what evidence, if any, was offered before the Commissioner the record does not show further than it recited in the warrant of commitment, which was issued by the Commissioner on the nineteenth day of October, 1922, committing him to jail, to wit: that "after an examination being made this day held by me, it appearing that said offence had been committed, and probable cause being shown to believe said Roland R. Pothier committed said offence as charged." On the sixth day of December, 1922, the appellant petitioned the District Court of Rhode Island for a writ of

habeas corpus, alleging, among other things, that the order of commitment was absolutely void and that he was confined and deprived of his liberty in violation of the constitution and the statutes of the United States, and praying that he be brought before the Court for hearing and that a writ of certiorari issue to the Commissioner directing him to certify to the court "all the proceedings which took place before him and all the evidence that was offered before him in said proceedings, which resulted in the issue of said commitment." On the seventh day of December, 1922, citations were issued and served requiring the marshal to produce the appellant before the court for hearing on the eleventh day of December, 1922, and show cause why said petition should not be granted, and directing the Commissioner to certify to the court all the proceedings had before him and all the evidence offered in said proceedings. On December 6, the United States district attorney filed a petition asking for an order directing the removal of the appellant to the Southern Division of the Western District of Washington, agreeably to the provisions of Section 1014 of the Revised Statutes of the United States. On this petition the court, on the seventh day of December, 1922, issued a citation, returnable December 11, 1922. On December 11, 1922, a hearing was had upon the petition for a writ of *habeas corpus* and for a writ of *certiorari* and on the petition for an order of removal. Evidence having been offered in support of the respective contentions of the parties, the court took the matter under advisement. On January 11, 1923, the District Judge filed an opinion in which he stated:

> "It appearing that the indictment was by a court of competent jurisdiction, that there was probable cause for his commitment by the commissioner, and that his imprisonment, restraint and detention were in accordance with law,—
>
> The petition is denied."

On the same day the court also filed an opinion with reference to the petition for removal in which he directed that a warrant for removal issue in accordance with the prayer of the petition, it having been ruled by the court that "the defendant has failed to overcome the *prima facie* case made by the indictment, and that the evidence fails to show the want of probable cause."

An appeal was taken directly to the Supreme Court, but, inasmuch as the question at issue did not relate to the jurisdiction of the District Court of Rhode Island but went to the merits of the controversy, the case was transferred to this court.

The crime charged in the indictment is not for a violation of Section 275 of the Penal Code, as stated in the affidavit filed with the commissioner and referred to by him as a complaint, but for a violation of Section 272, paragraph 3, and Section 273 of the Penal Code. Section 275 simply prescribes the penalty for the offenses defined in Sections 272, 273 and 274. Sections 272, 273, and 275 read as follows:

> "Sec. 272. The crimes and offenses defined in this chapter shall be punished as herein prescribed: . . .
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."
>
> "Sec. 273. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from

a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

"Sec. 275. Every person guilty of murder in the first degree shall suffer death. . . ."

The Constitution of the United States, Article I, Sec. 8, Clause 17, reads as follows:

"Sec. 8. The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-yards, and other needful buildings."

The indictment, as above stated, charged that the appellant, on October 25, 1918, deliberately and with malice aforethought shot Alexander P. Cronkhite "within and on lands theretofore acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, and within the Southern Division of the Western District of Washington, to wit: within and on the Camp Lewis Military Reservation." There is no dispute that Crankhite was killed on the Camp Lewis Military Reservation on the date named or that the Reservation was within the Southern Division of the Western District of the State of Washington. The appellant denies that he committed the crime and contends that the evidence introduced before the court at the hearing on the petition for a writ of *habeas corpus* and for an order of removal to the State of Washington shows that, at the time when Cronkhite was killed, the land constituting Camp Lewis

Military Reservation had not been acquired by the United States; that the sovereignty of the State of Washington over it had not been abdicated and had not become vested in the Government of the United States; that he had, therefore, not committed a crime against the United States as charged in the indictment, and that the District Court for the Southern Division of the Western District of Washington was without jurisdiction over the offense.

Inasmuch as this was the question desired to be litigated on this appeal and the evidence bearing upon the questions at issue on the petition for removal had not been heard or the order of removal entered at the time the *habeas corpus* application was filed, it was agreed between the parties, in order to avoid the delay that would be occasioned by bringing another petition for a writ of *habeas corpus* to test the validity of the order, that the present petition for such a writ should be treated as having been brought after the order of removal was entered and with like effect.

It has been held in this circuit in *Hastings* v. *Murchie*, 219 Fed. 83, 88, following the decisions in *Tinsley* v. *Treat*, 205 U. S. 20, and *United States* v. *Black*, 160 Fed. 431, that under Section 1014 of the Revised Statutes of the United States (under which the order of removal in this case was made), when an offender against the United States has been indicted in a district in a state other than the district of arrest, then, after the offender has been committed, it becomes the duty of the district judge, on inquiry, to issue a warrant of removal; that the inquiry which the judge is called upon to make, involves judicial discretion; that he must look into the indictment to ascertain if an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has jurisdiction of the same; that, on such hearing, the indictment, though *prima facie* evi-

dence of probable cause, is not conclusive; that evidence tending to show that no offense triable in the district to which removal is sought had been committed in that district should be received; and that to decline to receive it involved the denial of a right secured by the statute under the Constitution.

In this case the District Judge received the evidence bearing upon the question whether there was probable cause to believe that the appellant had committed the crime charged on land within Camp Lewis Military Reservation, within the exclusive jurisdiction of the United States in the Southern Division of the Western District of Washington, and found that there was probable cause to believe that he had committed such crime against the United States with that district, and that the District Court of the Southern Division of the Western District of Washington had jurisdiction of the offense.

The removal statute (Sec. 1014) does not provide that the decision of the district judge ordering the removal of an offender shall be final, but if we assume it to be final where the offender has been accorded a fair hearing on substantial evidence, and that, in such a case, the order of removal and proceedings thereunder would not be reviewable on *habeas corpus*, yet we do not understand that, if his findings are so entirely unsupported by evidence as to be unreasonable and to constitute an abuse of discretion and a denial of due process of law, they may not be so reviewed. In fact, it has been so held in this circuit in *Ex parte Petkos*, 212 Fed. 275, 277, which was a case relating to an order of deportation of an alien by the Secretary of Commerce and Labor under a statute expressly making the findings of the Secretary final; which decision was sustained in its main features on appeal to this court. *United States* v. *Petkos*, 214 Fed. 978. And in the case of *Gonzales* v. *Williams*, 192 U. S. 1, where the petitioner, a citizen of Porto Rico, had been

remanded to the custody of the United States Commissioner of Immigration for deportation under the immigration act of March 3, 1891 (26 Stat. at Large, 1084), as an alien immigrant, the court, on *habeas corpus*, reviewed the question whether the petitioner, in view of the facts found, was an alien immigrant within the meaning of the act, and held that the "commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and she was not obliged to resort to the Superintendent or the Secretary," in order to enable her to maintain her petition. In *United States* v. *Sing Tuck*, 194 U. S. 161, at page 168, Mr. Justice Holmes, in speaking of the case of *Gonzales* v. *Williams*, said:

> "There was no use in delaying the issue of the writ until an appeal had been taken, because in that case there was no dispute about the facts but merely a question of law."

And in other cases under the Immigration Act where the party ordered deported as being an alien, brought a petition for a writ of *habeas corpus* alleging and claiming that he was a citizen of the United States, it has been held that his citizenship, although it involved a question of fact, could be inquired into on *habeas corpus*, as his rights as a citizen were protected by the Constitution. And even where the applicant ordered deported was not and did not claim to be a citizen of the United States it has been held that he might have reviewed on *habeas corpus* the findings of the executive officers of the Government, if such findings were not authorized by the act or were not sustained by substantial evidence. *Zakonaite* v. *Wolfe*, 226 U. S. 272, 274; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457; *Skeffington* v. *Katzeff*, 277 U. S. 129. And in this circuit, in the last-named case, it was held that while the findings of fact by the executive officers are final, yet, if such findings are not authorized by the

act or are not sustained by substantial evidence, they may be reviewed and reversed on *habeas corpus*.

If, in deportation proceedings where the rights of aliens are involved, the findings of the executive officers may be reviewed on *habeas corpus* where there is no substantial evidence to support the findings, we think that, in removal proceedings where the rights of citizens are at stake, review may be had when there is no substantial evidence to warrant the finding of probable cause by the district court, or where, on all the evidence produced before the court, no other conclusion could be reached than that there was want of probable cause, or, what is the same thing, if the question of probable cause depends upon the construction of a statute and written instruments and the construction given them was erroneous or no construction of them was made. In all such cases the question presented would be one of law, the determination of which would disclose whether the alleged offender was unlawfully restrained of his liberty by the order of removal. See also *Mitchell* v. *Dexter*, 244 Fed. 926 (1st Cir. 1917).

We have before us in this case all the evidence presented at the hearing before the district judge on the petition to remove, which includes the indictment, the testimony of four fact witnesses, correspondence between the Secretary of War and the attorney of the county commissioners of Pierce county in the State of Washington, and the act of the legislature of that state authorizing Pierce county as an arm of the state to acquire by condemnation or purchase land in the vicinity of seventy thousand acres located in the state, and donate the same to the United States for a military reservation. We have cited the sections of the statute under which the indictment was brought and the provisions of the Constitution disclosing the way in which the general government may acquire title to land in a state and obtain the power of

exclusive legislation over the same. The leading case in the Supreme Court construing this provision of the Constitution and Section 272 (paragraph 3 of the penal code, is *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525. It was there said:

> "This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the legislatures of the States in which they are situated, for the specific purposes enumerated. It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings for the defence of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislatve authorty over them. Purchase with such consent was the only mode then thought of for the acquisition by the general government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the general government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. *The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion.* Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that

> case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals."

And it was there held that the state might cede its exclusive jurisdiction over land acquired by the federal government within the state directly by an act of the legislature expressly so stating, or indirectly when the purchase by the United States was with the consent of the legislature of the state; and that, where the legislature directly ceded its sovereignty over land within the state by a formal act of cession, it might reserve the right to execute civil and criminal process within the ceded land issued under its authority for acts done within and cognizable by the state, notwithstanding the cession. But once the cession of sovereignty was made over lands within a state purchased by the United States for one of the purposes designated in the statute and Constitution, "such consent under the Constitution operated to exclude all other legislative authority." The court also recognized in its opinion that the right of sovereignty of a state over land purchased by the United States within its boundaries were not to be taken away by implication; that the essence of the provision of the Constitution here under consideration was "that the State shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseizin of the State; much less can it be acquired by mere occupancy, with the implied or tacit consent of the State, when such occupancy is for the purpose of protection" (*People* v. *Godfrey*, 17 Johns. 225); that "where . . . lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected

for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed." And it was held that, inasmuch as the land constituting the Fort Leavenworth Military Reservation was not purchased by the United States after Kansas became a state but was acquired by it by cession from France many years before, whatever political sovereignty or dominion the United States had over the place came from the cession of the state since its admission into the Union.

In this case there is no claim that the United States had acquired or reserved title to the land embraced within the limits of Camp Lewis Military Reservation before or at the time Washington became a state. The evidence shows that its title was acquired subsequent to that time. Unless it had acquired title with the consent of the state at the time Cronkhite met his death on the military reservation, the crime of murder charged in the indictment was not an offense against the United States.

The District Court in passing upon this question apparently entertained the view that, inasmuch as the evidence showed that before the delivery of the deed and its acceptance by the Secretary of War the United States military authorities had entered upon some of the land acquired by the county and erected buildings and occupied the same with 50,000 men, the state thereby yielded up its sovereignty and the United States acquired exclusive jurisdiction over the land thus occupied; and that this being so, the *prima facie* case of probable cause made by the indictment was not overcome. But, as we have seen above, this evidence had no tendency to show that the state had ceded its sovereignty, as the state's right of sovereignty is not to be taken away by implication.

An examination of the act of the legislature of Washington of 1917, under which Pierce county was authorized to acquire and to donate the land here in question, discloses that it was drawn with great care. It recites that the Secretary of War, with the approval of the President of the United States, had agreed on behalf of the federal government to establish in Pierce county, Washington, a permanent mobilization, training and supply station, *on condition* that land in Pierce county aggregating approximately seventy thousand acres, at such location or locations as have been or may be hereafter, from time to time, selected or approved by the Secretary of War, *be conveyed* to the United States, with the *consent* of the State of Washington, free of cost to the United States. In Section 2 there was imposed upon Pierce county an indebtedness not to exceed two million dollars and the obligation to acquire by condemnation or otherwise land in Pierce county for the purpose above named and convey all such lands to the United States to be used for that purpose. Section 3 provided for the issuing of bonds for the indebtedness. In Sections 4, 5, 6 and 7 provision was made for the assessment of taxes and the payment of the bonds and interest, and in Sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 the power of eminent domain was given for the acquisition of the lands and the mode of procedure thereunder pointed out in great detail. Section 20 reads as follows:

> "Sec. 20. Pursuant to the constitution and laws of the United States, and especially to paragraph seventeen of section 8 of article one of such constitution, the consent of the legislature of the State of Washington, is hereby given to the United States *to acquire*, by donation from Pierce county, title to all lands herein intended to be referred to, *to be evidenced by the deed or deeds of Pierce county signed by the chairman of its board of county commissioners and attested by the clerk of such board under the seal of such board*, and

> *the consent* of the State of Washington *is hereby given to the exercise by the congress of the United States of exclusive legislation* in all cases whatsoever *over such tracts or parcels* of land *so conveyed* to it: *Provided, Upon such conveyance being concluded* a sufficient description by metes and bounds and an *accurate plat or map* of each such tract or parcel of land *be filed in the auditor's office of Pierce county, together with copies* of the orders, *deeds*, patents or other evidences in writing *of the title of the United States;* and Provided, That all civil process issued from the courts of this state and such criminal process as may issue under the authority of this state against any person charged with crime in cases arising outside of said reservation, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made."

It is apparent that this section, read in the light of the surrounding circumstances, means that the sovereign right of the State of Washington over the land in question and the acquisition of exclusive legislative authority and jurisdiction by the United States thereover was not to take place when the land had been conveyed by deed, but only when, upon such conveyance being concluded, a sufficient description by metes and bounds and an accurate map of each tract or parcel of land, together with copies of orders, deeds, patents and other evidences of title, had been filed for record in the auditor's office of Pierce county. The deed was not executed and acknowledged until the first day of October, 1919, when it was signed and acknowledged by the board of county commissioners for Pierce county and accepted on behalf of the United States of America, by Newton D. Baker, Secretary of War; and it was not recorded in the office of the auditor of Pierce county until November 15, 1919.

The correspondence in the case indubitably shows that the parties understood and acted upon the idea that no title was to pass to the United States until the deed was delivered and accepted by the Secretary of War (see letters of December 2, 1916, and June 21, 1918); and the acts of Congress show that down to July 2, 1917, no public money could be expended upon any land acquired by the United States (much less to be acquired) for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy-yard, etc., until the written opinion of the Attorney-General had been had in favor of the validity of the title, "nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given." Rev. Stat. s. 355; see letter of December 2, 1916, Exhibit C, written prior to July 2, 1917. On July 2, 1917, the Secretary of War was given authority to purchase or condemn land for fortifications, coast defenses and military training camps or to enter into contracts for the use of the same for such purposes and to "accept donations of land and the interest and rights pertaining thereto required for the above-mentioned purposes"; and it was further provided:

> "That when such property is acquired in time of war or the imminence thereof upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto *to be acquired* for any of the purposes aforesaid, *immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes*, and the provision of section three hundred and fifty-five of the Revised Statutes, providing that no public money shall be expended upon such land until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land is located

> has been given, shall be, and the same are hereby, suspended during the period of the existing emergency." Act of July 2, 1917, 40 Stat. at Large, 241; Act of April 11, 1918, 40 Stat. at Large, 518; see letter of July 1, 1918, where it says: "prior to the expiration of the existing war."

This shows plainly the circumstances under which the authorities of the general government entered upon a portion of the land and expended money in the erection of buildings thereon in advance of having obtained title thereto or the approval of title by the Attorney General, and without having obtained the consent of the state.

We are of the opinion that no other conclusion can be drawn from the evidence than that, at the time the crime charged in the indictment was committed, the United States had acquired no title in the land embraced within Camp Lewis Military Reservation; that the sovereignty of the state over the tract had not then been yielded up and was not until the deed, map, etc., were filed in the office of the county auditor of Pierce county for record, which was not until November 15, 1919, more than a year after the alleged murder. This being so, there is an absolute want of probable cause for the removal of the appellant to answer to the crime charged. *Green* v. *Henkel*, 183 U. S. 249, 261.

The order of the District Court directing the removal of the appellant is reversed, and the petition for an order of removal is denied. The decree of the District Court dismissing the petition for a writ of habeas corpus is reversed; and it is ordered that the appellant be discharged from custody.